New York State Bar Association

Committee on Professional Ethics

Opinion 784 – 1/12/05

Topic: Ancillary business organizations; conflict of interest

Digest: Lawyer-principal in entertainment management firm may represent client of such firm in some but not all types of legal matters.

Code: DR 1-106; DR 3-101; DR 3-102; DR 5-101; DR 5-104(A).

QUESTION

May a lawyer, through his or her law firm, represent clients who are separately represented by the entertainment management company in which the lawyer is a principal?

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FACTS

The lawyer is a member of a law firm which concentrates in, among other things, entertainment law. The lawyer is also a principal in a separate management company that represents artists, celebrities, entertainers and corporate clients. Several of the law firm's clients have requested that, through the management company, the lawyer manage their careers in the entertainment industry while the law firm continues to provide them with legal services. Specifically, the management company may enter into (1) a management arrangement with a client or with a business entity owned by the client, for which the management company would receive a standard fee or (2) a business arrangement pursuant to which the management company and the client's business entity would form a separate entity for the purposes of developing the client's business opportunities.

Under either arrangement no non-lawyer employee of the management company will offer legal advice to clients of the law firm, in accordance with DR 3-101, and legal fees will not be shared by the law firm with the management company, in accordance with DR 3-102.

The management company will provide services only to those law firm clients who have requested such services.

OPINION

DR 1-106(A)(3) of the Lawyer's Code of Professional Responsibility (the "Code") provides that a lawyer who is a controlling party of an entity that the lawyer knows to be providing non-legal services to a client is subject to the disciplinary rules with respect to the non-legal services if the client could reasonably believe that the non-legal services are the subject of an attorney-client relationship. DR 1-106(A)(4) creates a presumption that the client receiving the non-legal services from the non-legal services entity believes the services to be the subject of an attorney-client relationship unless the lawyer *qua* lawyer advises the client otherwise in writing. Furthermore, DR 1-106(B) provides that a lawyer that is a controlling party of a non-legal services entity shall not permit any non-lawyer providing such services to direct or regulate the professional judgment of the lawyer or to cause the lawyer to compromise the duty of confidentiality.

Shortly after DR 1-106 was added to the Code, this Committee issued N.Y. State 752, 753 and 755 (each in 2002). In N.Y. State 752 we noted that notification to the client under DR 1-106 waives application of the disciplinary rules to the *non-legal* services. DR 5-101(A) continues to apply to provision of the legal services and bars the lawyer or law firm from offering non-legal services if the non-legal services activity creates an impermissible conflict with the legal representation. If the management company described above will provide non-legal services to a client of the law firm, the law firm may continue to represent the client only if a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest in the management company.

N.Y. State 752 also discussed earlier Committee opinions which opined that in certain circumstances a lawyer also engaged in a non-legal business cannot provide both legal and non-legal services in the same transaction *even with the consent of the client*. We noted our determination in these earlier opinions that the lawyer could not act as both the lawyer and broker in the same transaction,[1] and that such opinions rest primarily on DR 5-101(A): "[t]he rationale is that the broker's interest in closing the transaction interferes with the lawyer's ability to render independent advice with respect to the transaction." We concluded that those opinions survived the adoption of DR 1-106.

So while the Code does not impose a *per se* prohibition upon either arrangement described above, there are likely to be particular transactions negotiated for the client by the management company in which it is improper for the law firm to represent the client. Identification of those transactions may depend at least in part on the dollar value of the transaction and the method by which the management company is compensated. For example, it would be improper for the law firm to represent the client in connection with a valuable endorsement agreement being negotiated by the management company if compensation of the management company will turn on the legal advice to be rendered. The

[1] *E.g.*, real estate broker, N.Y. State 208 (1971); N.Y. State 291 (1973); N.Y. State 340 (1974) N.Y. State 493 (1978); securities broker, N.Y. State 536 (1981); insurance broker, N.Y. State 619 (1991)

commission payable to the management company might be ten percent of millions of dollars payable to the client under the endorsement contract, while the legal fees in connection with negotiating and drafting the agreement may be only several thousand dollars. In the eyes of a disinterested lawyer, the management company's interest in closing the transaction would interfere with the law firm's ability to render independent legal advice with respect to the transaction.

There are other services that the law firm could generally render to clients of the management company without violating DR 5-101. Examples of such services include estate planning, real property transactions (if neither the lawyer nor the management company is acting as broker) and tax services.

Although we concluded in N.Y. State 755 that DR 5-104(A) does not apply when a lawyer recommends that the client employ a distinct lawyer-owned ancillary business,[2] if the management company and client's business entity form a separate entity as described above, such formation would constitute a business transaction subject to the requirements of DR 5-104(A). Whether or not the law firm may continue to provide legal services to the client with respect to transactions negotiated by the newly formed entity will be controlled by DR 5-101(A) as discussed above.

CONCLUSION

A lawyer may, through his or her law firm, represent clients who are separately represented by the entertainment management company in which the lawyer is a principal, in some but not all types of matters.

(31-04)

[2] As long as the lawyer takes steps to ensure that the client understands that the protections of the attorney-client relationship do not apply to the non-legal services. DR 1-106(A)(4).